Supreme Court, U.S.
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No. 04-483

IN THE

Supreme Court of the United States

NOREEN JUDITH HUNTER,

Petitioner,

v.

NONA PORTER, ADMINISTRATRIX OF THE ESTATE OF JOSEPH S. HUNTER,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPEALS COURT FOR THE COMMONWEALTH OF MASSACHUSETTS

BRIEF IN OPPOSITION

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STATEMENT

The statement of facts filed by the petitioner herein is remarkable both for what is alleged and for what is not included. The history of the aggressive actions taken by Noreen McKeever Hunter against Joseph Hunter and his daughter, Nona Porter, the administratrix of his estate, is extensive, and it received far from detailed treatment by Ms. McKeever Hunter in her petition to this Court.

The most dramatic recital is perhaps that which is contained in the reported decisions *Keville v. McKeever*, 42 Mass. App. Ct. 140 (1997), further appellate review denied, 494 Mass. 1107 (1997). In the first of those reported decisions, the Massachusetts Appeals Court quoted at some length from the judgment of the Probate and Family Court (all page references being to the Appeals Court decision):

> "Joseph Hunter was declared to have been incompetent from at least August of 1982 . . . (p.143);
>
> "The McKeevers were also adjudged liable to Joseph, individually, or jointly and severally, for various sums amounting to approximately $1.5 million dollars . . . (p.143);
>
> The judge found that there was no credible evidence that Noreen was, in fact, Joseph's daughter . . . (p.144);
>
> Noreen told Ron that 'Joseph was crazy, had always been crazy, and that he didn't know what was going on . . .' (p.145);

> The judge found that, starting in 1988, 'the McKeevers engaged in a thorough stripping of all of (Joseph's) assets'. . . (p.145);
>
> Noreen forged Joseph's name to obtain credit cards . . . (p.146);
>
> On March 3, 1990, Marian forged Joseph's signature on a deed transferring title to the Harvard Avenue property from him individually and as trustee of the J. Hunter Realty Trust, to Marian and Noreen, as trustees of the Bourne-Hunter Realty Trust, a trust they had created that same day and of which they were the sole beneficiaries . . . (p.146);
>
> Within days of receiving the September 23, 1991, order restraining them from using or disposing of any of Joseph's cash assets, or cash assets traceable to him, the McKeevers closed several bank accounts containing substantial sums of money, that, the probate judge found, were directly traceable to Joseph . . . (p.154);
>
> The judge found that Noreen's purpose in obtaining the mortgage loan was to put as much on the property as soon and as quickly as possible because Nona and Ron were going to try to take the property from her, and by having a lien on the property, it would be a lot harder to so . . . (p.161)"

In a judgment on a complaint for contempt brought by Ms. Porter as administratrix of her father's estate on September 25, 1997 (Suffolk County Probate and Family

Court case no. 90P 2892), the Court on February 10, 1998, said that

> "having stolen the bulk of Joseph Hunter's assets when he was alive but mentally incompetent, Ms. Hunter now seeks, after his death, to destroy what is left of his estate. . . . The defendant . . . said she would stay at 390 Marlborough St., 'forever' and that she would take the administrator to court until she 'died'. . . . The defendant's actions in this case constitute criminal contempt of this court. No jail sentence is imposed at this time. However, it is clear that the defendant is determined to follow a policy of destruction concerning the estate of Joseph Hunter. . . ."

Mr. Hunter died on April 27, 1996, and Noreen McKeever Hunter, who was then 42 years old, filed a complaint for declaratory judgment against Nona Porter as administratrix in Norfolk County Probate and Family Court under docket no. 97E 0118-GC1 on December 11, 1997, seeking an adjudication that Noreen was the daughter of Joseph Hunter for the purpose of establishing entitlement to his estate. At that time more than 19 months had gone by since Mr. Hunter's death, and there had been no court adjudication of paternity during Mr. Hunter's lifetime, nor had Ms. McKeever Hunter commenced in Court an action in which the administratrix was a named party within one year after Mr. Hunter's death (the requirements of Massachusetts General Laws c.190, § 7 and c.197, §13).

The administratrix moved to dismiss, citing those two statutes and the litigation history between the parties. The Probate and Family Court dismissed the complaint for

declaratory judgment on January 19, 1999, (more than 5 1/2 years ago), referring to the above statutes, and saying further that "extraneous equity considerations, if relevant, would favor the defendant. *See Keville v. McKeever*, 42 Mass. App. Ct. 140 (1997)."

The petitioner, Noreen McKeever Hunter, appealed, and, with the permission of the Massachusetts Appeals Court, the administratrix, Nona Porter, the defendant on that complaint for declaratory judgment, submitted to the Appeals Court a copy of the Judgment on the Complaint for Contempt referred to above.

The Court of Appeals for Massachusetts affirmed the judgment dismissing the complaint for declaratory judgment on January 29, 2003, and judgment after rescript was entered on February 28, 2003. The Massachusetts Rules of Appellate Procedure (Rule 27.1) provide that "within twenty days after the date of the rescript of the Appeals Court any party to the appeal may file an application for leave to obtain further appellate review of the case by the full Supreme Judicial Court.

As time went on Ms. Porter was justified in believing that despite the earlier threat of endless litigation made by Ms. McKeever Hunter, perhaps the lawsuits were over. However, fourteen months after the entry of the judgment after rescript Ms. McKeever Hunter through her third appellate attorney of record filed in the Massachusetts Supreme Judicial Court a motion to file late and an application for leave to obtain further appellate review. That Court denied the application for further appellate review on June 30, 2004.

Again, the expectation was that the litigation was concluded. On October 13, 2004, a message came from a printer of Supreme Court briefs to Ms. Porter's attorney that a petition for a writ of certiorari had been filed by Ms. McKeever Hunter in the United States Supreme Court on September 28, 2004. The petitioner – as of the date this opposition is being filed – has served nothing on the respondent in this matter. Respondent's familiarity with the petition is thanks to the kindness of the Clerk's office, which forwarded a copy of it on request.

In the course of the thin recital of the background in Ms. McKeever Hunter's petition, she has made no mention whatever of the substantial monetary judgment entered against her in the Probate and Family Court in September 1998, nor has she alluded to any efforts to make payment of that judgment obligation.

On the other hand, Ms. McKeever Hunter has sprinkled through her statement in this case arguments and contentions as if they were facts found in some legal proceeding. Her statements as to her mother's thoughts and activities are both irrelevant and not proved. The alleged affidavit of Joseph Hunter has never been admitted in evidence in any court. Alleged "statements to his attorneys" have never been admitted in evidence in any court. Allegations regarding statements by Nona Porter and her brother Ronald Hunter allegedly made in the course of discovery in other litigation are misleading, irrelevant, and taken out of context. Despite the contentions in Ms. McKeever Hunter's current petition, she did not "adduce proof" of anything in her unsuccessful opposition to the motion to dismiss.

Referring in her current petition to her date of birth, December 9, 1955, Ms. McKeever Hunter says that "there was no formal adjudication of Joseph's paternity of Noreen at that time." The more accurate rendition of that sentence would be that "there was *never any* adjudication of Joseph's *alleged* paternity of Noreen at *any* time."

REASONS FOR DENYING THE PETITION

The underlying case was correctly decided in the Probate and Family Court of the Commonwealth of Massachusetts, and that judgment was affirmed by the Massachusetts Appeals Court. The Supreme Judicial Court for the Commonwealth denied an application for further appellate review. There has been no compelling argument put forth by the petitioner for the granting of a writ of certiorari.

There is no compelling reason for this Court to exercise judicial discretion by granting a writ of certiorari. Petitioner has cited no conflicts of court decisions regarding issues presented in this case. No federal questions have been decided by the Massachusetts Courts in this case. In short, the petitioner has completely failed to set forth reasons for this Court to grant a writ of certiorari under Rule 10.

The petitioner has repeated contentions which she previously made to the Massachusetts Appeals Court, and has made new references to most of the cases cited by her in her arguments in that Court. Since her theories are the same, the rebuttals are fundamentally the same.

She alleged that she was born on December 9, 1955, and that in 1980, at age 24, she filed a petition in Suffolk Probate

Court to change her name from McKeever to Hunter. She has argued that Joseph Hunter lived with her mother for many years. Despite those allegations, she has submitted to this Court that there should be equitable tolling of the statute of limitations, and to support that contention, she has cited the holding on the starting date of the statute of limitations in a legal malpractice case, *Williams v. Ely*, 423 Mass. 467 (1996), quoting from page 473 of that decision that the running of the statute would begin when the plaintiff "learned or reasonably should have known of the harm caused by the defendant's conduct." Further on that same page of the decision, the Court went on to say that "once [the plaintiff] knows or reasonably should know that he or she has sustained appreciable harm . . . the statute of limitations starts to run." It is difficult to credit that in light of her other allegations the appellant could seriously put the argument that she falls into the category of plaintiff for whom the statute of limitations should be tolled because of lack of knowledge.

In her argument the petitioner stressed holdings in cases which are not in dispute and which have no bearing on issues in the present case. *Commonwealth v. Chase*, 385 Mass. 461 (1982), dealt with the starting date for child support, but that is not in dispute here. *Powers v. Wilkinson*, 399 Mass. 650 (1987), determined that the word "issue" includes all biological descendants regardless of the marital status of the parents, but no language of any estate planning instrument is being construed here. *Telesetsky v. Wight*, 395 Mass. 868 (1985), interpreted the then language of the statute limiting actions by creditors against estates, M.G.L. c.197 § 9, but that statute has since been amended and its meaning is not currently in dispute. *Department of Revenue v. Roe*, 29 Mass. App. Ct. 867 (1990), determined that a retroactive order of child support was constitutional and that the entered order

was appropriate, but here there is no such order or controversy. *Flynn v. Connors*, 39 Mass. App. Ct. 365 (1995), discussed the statute of limitations for the pursuit of past child support, and the appropriate methods of pursuing someone who has not fulfilled his child support obligations despite a previous court determination of paternity.

Appellant has then cited cases in which Massachusetts has allowed the equitable tolling of a limitations statute – *McLearn v. Hill*, 276 Mass. 519 (1931); *MacKeen v. Kasinskas*, 333 Mass. 695 (1956); *Christo v. Edward G. Boyle Insurance Agency,* 402 Mass. 815 (1988). All of those cases, however, turned on the allegation that representatives of the defendant had said or done something deceptive or misleading which caused the prospective plaintiff not to file suit or assert a claim in timely fashion. No such allegation can be, or is, made in this case. She has cited a fourth case, *Shafnacker v. Raymond James & Associates, Inc.*, 425 Mass. 724 (1997), in which the Court noted that equitable tolling is used only sparingly and ruled that that was not a case for the rare invocation of an equitable tolling of the statute of limitations.

The discussion of cases in other jurisdictions where local statutes imposed far more stringent curbs on the assertion of rights by one alleging paternity is also unrelated to any issue now before this Court. *See Trimble v. Gordon*, 430 U.S. 762 (1977); *Mills v. Habluetzel*, 456 U.S. 91 (1982).

Lowell v. Kowalski, 380 Mass. 663 (1980), has already discussed the constitutionality of M.G.L. c. 190 § 7, at pp. 668-669:

> "We consider then whether there is any compelling State interest in support of

distinguishing between the right of an illegitimate child to inherit from his or her natural father and such child's right to inherit from his or her natural mother. The statutes extending rights of inheritance to illegitimate children were enacted to give rights to illegitimate children that they did not have at the common law. At common law an illegitimate child could inherit from no one. *Vallin* v. *Bondesson*, 346 Mass. 748, 750 (1964). If an illegitimate child's status as an heir could be ascertained with equal ease as to each natural parent, no statutory distinction between the two situations would be needed or could be justified. There is a difference, however, between establishing paternity and establishing maternity. See *Lalli* v. *Lalli*, 439 U.S. 259, 268-271 (1977). A distinction between rights to inherit from a natural father and rights to inherit from a natural mother may properly be based on the greater difficulty of proving paternity than of proving maternity.

In *Commonwealth* v. *MacKenzie*, 368 Mass. 613 (1975), a case that involved a proceeding to establish the defendant's paternity, we concluded that a statutory distinction between paternity and maternity of an illegitimate child rested "on more than a sex-based classification." *Commonwealth* v. *MacKenzie*, *supra* at 617-618.[1] The distinction

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1. That case was decided before the adoption of the State ERA, but we acknowledged the appropriateness of its analysis subsequent to the adoption of the State ERA. *See Attorney Gen. v. Massachusetts Interscholastic Athletic Ass'n*, 378 Mass. 342, 357-358 (1979).

> reflected significant circumstantial differences between the fathers and the mothers of illegitimate children. "[B]ecause the woman carries and bears the child, the pressures of society make it nearly impossible for her successfully to deny parenthood or to avoid responsibility for the child. The father, on the other hand, because not visibly linked to the child, often is unaware of the tie or denies it, and thus the fact of his parenthood is more difficult to prove." *Id.* At 617.
>
> In the case before us where the father is deceased, as was not the situation in the *MacKenzie* case, the problem of determining the truth and of avoiding the fraudulent claims is even more difficult. Thus, because the possibility of fraud is usually greater with respect to claims against the estate of a deceased man than against the estate of a deceased woman, we recognize that the State has a compelling interest in imposing a stricter standard for establishing an illegitimate child's right to inherit from its father than from its mother. [2]

The analysis is as appropriate now as it was at the time of *Lowell v. Kowalski.*

Massachusetts General Laws Chapter 197, Section 13, cited in the petition, would perhaps have been relevant if the

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2. We reject as an adequate compelling State interest any greater difficulty in an estate's representative identifying and giving notice to the illegitimate children of a man than of a woman. Notice by publication should be adequate as to persons whose alleged status is not known by the estate's representative.

petitioner's right of action had not accrued within one year after the date of Mr. Hunter's death. Since, however, the petitioner could have brought suit to establish paternity (either through an action filed by her mother while the petitioner was a minor, or in her own name after she achieved her majority), her paternity cause of action actually accrued in 1955.

The contentions made as to the Equal Protection Clause have nothing to do with the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. A detailed discussion of the state's interest in distinguishing rights to claim through a father from rights to claim through a mother is set forth in *Lowell v. Kowalski*, *supra*, at 668, 669.

Ms. McKeever Hunter for this petition has added references to two relatively recent Massachusetts decisions, *Goodridge v. Department of Public Health*, 440 Mass. 209 (2003), and *Blixt v. Blixt*, 437 Mass. 649 (2002). The former addresses the issue of same sex marriage, and the latter is concerned with the visitation rights of grandparents. Neither case is on point for any issue raised by the petitioner, although the Massachusetts Supreme Judicial Court did say in *Blixt*, at 652, that

> "a facial challenge to the constitutional validity of a statute is the weakest form of challenge, and the one that is the least likely to succeed. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987). A statute so questioned is presumed constitutional. See *Landry* v. *Attorney Gen.*, 429 Mass. 336, 343 (1999), cert. denied, 528 U.S. 1073 (2000)."

Nine months after the *Blixt* decision, the Massachusetts Supreme Judicial Court correctly denied Ms. McKeever Hunter's petition for further appellate review.

Her original complaint for declaratory judgment to determine paternity was correctly dismissed because there was no way that the petitioner could get around the limitation barriers of Massachusetts General Laws, c.190, § 9. There was no judgment of paternity during Mr. Hunter's lifetime, and within one year following his death on April 27, 1995, Ms. McKeever Hunter did not commence in court an action in which the administratrix was a named party. Finally, as the Probate and Family Court Justice concluded on January 19, 1999, "extraneous equity considerations, if relevant, would favor the defendant."

CONCLUSION

For all the above reasons, this Court should deny the Petition for Writ of Certiorari, and grant such other and further relief as it may deem meet and just.

Respectfully submitted,

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